SUPREME COURT, U. S.

FILED

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 325

THE PENNWICK CORPORATION,
a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Appellee.

Appeal from the Decision of the Court of Appeal of the State of California, Second Appellate District, Division Two, 2nd Civil No. 31240 and of the California Supreme Court

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JURISDICTIONAL STATEMENT

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Appeal from the Decision of the Court of Appeal of the State of California, Second Appellate District, Division Two, 2nd Civil No. 31240 and of the California Supreme Court

JURISDICTIONAL STATEMENT

PRIOR PROCEEDINGS

This is an appeal by a retail liquor licensee

from the decision of the California Court of Appeal, Second Appellate District, Division Two, rendered May 10, 1968, which was unreported. The decision of the Court of Appeal, entitled Reimel v. House (appended hereto as Appendix A) reversed the decision of the Honorable Ralph Nutter, Judge of the Superior Court of Los Angeles County, which decision denied a Writ of Mandate directed to the Alcoholic Beverage Control Appeals Board of the State of California. Said Appeals Board had held in favor of Appellant in an unreported case appended hereto as Appendix "B".

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

The proceedings in the State Court arise out of administrative proceedings before the Department of Alcoholic Beverage Control of the State of California for a violation of §24755 Business and Professions Code of the State of California, the California Mandatory Retail price fixing law. The Department ordered the license suspended for sales of liquor below mandatory retail prices which had been filed by liquor distillers with the State of California.

Appellant duly appealed to the Alcoholic Beverage Control Appeals Board, a State body set up by the California Constitution to review decisions of the Department. Said Appeals Board reversed the decision of the Department on State grounds, although the Federal grounds

had also been raised. Such decision was filed on November 2, 1965.

The Department then petitioned the Superior Court of Los Angeles County for a Writ of Mandate directing the Appeals Board to annul its decision.

The Superior Court denied the Petition for a Writ of Mandate and the Department appealed to the Court of Appeals. The Appeals Board was the named respondent and The Pennwick Corporation was the named Real Party in Interest. The Court of Appeals reversed the decision of the Superior Court on May 10, 1968. Pennwick petitioned for a hearing to the California Supreme Court which Petition was denied on July 3, 1968 without opinion.

This is an appeal pursuant to 28 U.S.C.A. 1257(2). Among the cases believed to sustain jurisdiction are Seagram & Sons v. Hostetter, 384 U.S. 35 and Standard Oil Company of California v. Johnson, 316 U.S. 481.

The California Statutes and laws which appellant claims to be in violation of the United States Constitution and the Federal Anti-Trust laws are California Business and Professions Code, §24755, a copy of which is appended hereto as Appendix "C" and Title 4, California Administrative Code, Rule 99, appended hereto as Appendix "D".

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are as follows:

1. Whether or not the California Liquor Price Fixing Laws (§24755 of the Business and Professions Code) are invalid as being in violation of the Anti-Trust Laws of the United States (15 U.S.C.A. §§ 1, 2 and 45), because they do not come within the exceptions provided in the Miller-Tydings or McGuire Acts and because prices are fixed for goods that are not in fair and open competition.

2. Whether or not §24755 Business and Professions Code and Title 4, Rule 99, California Administrative Code are violative of the Due Process Clause of the Fifth Amendment and the Due Process and the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution because:

(a) The statute sets up privilege for liquor manufacturers and wholesalers whereby the State of California at public expense enforces the fixed price. Such enforcement is not provided for any other industry.

(b) Two different trading areas are set up within the State. No valid reason or legitimate purpose exists for either of the foregoing discriminatory practices.

(c) A state function is delegated to private industry without adequate, or indeed, any safeguards.

(d) Economically disadvantaged persons are required to purchase inferior goods and are prevented from taking advantage of quantity discounts. The statute, if effective, only enforces prohibition for the poor and not the wealthy.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Appellant holds a license to sell alcoholic beverages. This license was suspended after an administrative hearing by the Department of Alcoholic Beverage Control for sales of alcoholic beverages below a minimum price filed by the wholesalers and manufacturers of the alcoholic beverages in violation of §24755 Business and Professions Code.

The federal questions were raised at all stages of the proceedings; initially, in the notice of defense filed at the administrative level. The notice of defense is appended hereto as Appendix "E". The federal questions are raised on pages E-5 to E-8, inclusive.

In the Notice of Appeal before the Appeals Board the federal questions were also raised (see Appendix "B", p. B-2).

The issues were not reached by the Appeals Board (Appendix B-6). The federal questions are raised in the answer to Petition for Writ of Mandate, appended hereto as Appendix "F" at pages F-12 to F-13.

The federal issues are also set forth in the briefs filed with the Court of Appeals at pages 17 to 21, inclusive and in the Petition for Hearing in the California Supreme Court. Said brief and petition are filed concurrently herewith as part of the certified record in this case.

In essence, the attitude of the California Courts has been that the constitutional issues have been settled in California by virtue of the cases of Wilke and Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 385 and Reimel v. Alcoholic Beverage Control Appeals Board, 256 A.C.A. 188 (now before this Court as Cohen v. Kirby, Oct. Term 1967).

By virtue of §24755 Business and Professions Code, a manufacturer of alcoholic beverages need only file a minimum price schedule for such beverages with the State of California and publish it in a trade journal. Thereafter, the State of California, at no expense whatsoever to the manufacturer enforces his minimum price by gathering evidence and prosecuting the violators. There is no state control of the price to be set. Only the manufacturer sets the price.

The rules of the Department allow a 10% discount on the minimum price for case purchases. There is also a substantial number of

sales in California of non-brand name alcoholic beverages for which no minimum price is filed. These non-branded liquors are substantially cheaper than the branded items and are usually inferior in quality.

A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THE PROPOSED APPEAL

Petitioner alleges that §24755 of the California Business and Professions Code violates the Constitution of the United States in that it is violative of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and further alleges that it is in conflict with the Sherman Anti-Trust Act (15 U.S.C.A., §§ 1, 2 and 45).

This State statute has been before the California Supreme Court twice in the last eight years, Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P. 2d 737, and Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P. 2d 735.

The statute in question is California's mandatory price fixing statute for alcoholic beverages. Under the statute, manufacturers merely file and publish the price at which their brands are to be sold. No state agency controls the price and the manufacturer is free to set any

price he chooses for his product. Thereafter, the Department of Alcoholic Beverage Control enforces the price at no cost to the manufacturer and licensees are subject to suspension and/or revocation of their license for sales below the filed price.

The statute was first held to be constitutional in the Allied Properties case, supra, in 1959, by a four to three decision. In 1966, the California Supreme Court again consented to hear a case deciding the constitutionality of the statute, and in the Wilke and Holzheiser case, supra by a five to two decision, again held the statute to be constitutional.

It should be emphasized that §24755 is not a civil fair trade statute providing a civil remedy to persons aggrieved by sales below a fair trade price. It is a State administered statute providing for action by the State to enforce the manufacturer's prices through the offices of the Department of Alcoholic Beverage Control.

The Allied Properties case, supra, was not appealed to this Court. In the Wilke and Holzheiser case, supra, an application was made to a three Judge District Court which held that plaintiff's remedy was solely by way of appeal or petition for certiorari to the United States Supreme Court, 266 F. Supp. 168.

These are the first cases involving a ruling on the constitutionality of the liquor price fixing statute of California where application has been made to this Court.

There is a sharp division of authority among the highest courts of other states as to the constitutionality of liquor price fixing statutes similar to California's statute.

The Louisiana Supreme Court in holding a mandatory liquor price fixing statute, that was similar to California's unconstitutional, stated that the statute:

> "'. . . bears no real or substantial relation to the general health, morals or welfare of the people. At best, it represents an ignoble flight from competition."

Reynolds v. Louisiana, Board of Alcoholic Beverage Control, 185 So. 2d 794, 812 (La. 1966) (Petition for Certiorari to U. S. Supreme Court denied, U.S. Law Week 3173, November 14, 1966).

The Supreme Court of New Mexico held in Drink, Inc. v. Babcock, 421 P. 2d 798, that the New Mexico statute,

> ". . . [was] not an appropriate exercise of the States' police power . . . ."

421 P. 2d at 803.

Perhaps the most succinct analysis of the true purpose of these liquor fair trade laws is contained in the decision of the Florida Supreme Court, holding such a law unconstitutional,

wherein the court stated:

> "The act, upon its face, is one not designed to affect the public health, safety or welfare, but is designed solely for the protection of the wholesale liquor dealer by allowing him to control the retail prices so that his customers may be forced to sell liquor at a substantial prifit. . . ."
>
> Scarborough v. Webbs Cutrate Drug Company, 150 Fla. 754, 8 So. 2d 913, 922 (1942).

Similar liquor price fixing statutes have been held unconstitutional in Oklahoma in Oliver v. Oklahoma Alcoholic Beverage Control Board, 359 P. 2d 183 (1966); in Kansas in State v. Mermes, 358 P. 2d 936 (1961); in Illinois in Lombardo Wine Co. v. Taylor, 95 N. E. 2d 60; and in Nebraska in Terry Carpenter v. Nebraska Liquor Control Commission, 120 N. W. 2d 374.

In the Allied Properties case, supra, the dissenting judge in the California Court of Appeals pointed out in connection with the statute that:

> ". . . the very person or corporation that manufactures or distributes the product sets the price at which the retailer may and must sell, without any right of any kind or character on the part of any representative of the State, to challenge it for price, quality

or otherwise. This, to me, is uncontrolled monopoly run riot with State sanction."

339 P. 2d at 1024.

Mr. Justice Peters of the California Supreme Court, who dissented in the Allied Properties case, supra, also stated in his dissent in the Wilke and Holzheiser case that:

". . . the fair trade provisions of the Alcoholic Beverage Control Act, together with the disciplinary power given the Department of Alcoholic Beverage Control directly by the Constitution, comprises a mandatory price fixing system whereby the producers or wholesalers of branded or trade-marked alcoholic beverages fix the retail prices of those beverages, and adherence to the prices is guaranteed by threat of imposition by the State of Civil and Criminal sanctions upon non-complying retailers."

55 Cal. Rptr. at 44.

He then concluded that:

"It is apparent from an analysis of the liquor fair trade law, however, that it bears no relation at all to the purported objective of promoting temperance. While the stated purpose of the law is to restrict the sale

and consumption of alcoholic beverages the use of fair trade contracts as a means necessarily guarantees that that objective will not be achieved." (Emphasis added.)

55 Cal. Rptr. at 47.

The California price fixing statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it is enforced by the State of California for the benefit of liquor manufacturers and against liquor retailers while no other manufacturers of any other goods have this privilege and no other retailer of goods are subject to this discipline and enforcement, and, because, with no basis for the distinction, two different trading areas are set up within the State and the manufacturer can file one price for Northern California and another price for Southern California. The taxpayers of California thus support a non-governmental special segment of the economy.

Furthermore, the effect of mandatory price fixing is to make drinking of branded liquors economically impossible only for low income groups who are required to purchase non-branded alcoholic beverages which are sold at substantially reduced prices. California statutes also allow a ten per cent (10%) discount on brand items for case purchases. Thus, the wealthy not only are the only ones who can afford the branded fair traded items, but if they have sufficient purchasing power, they may avail themselves of a ten per cent (10%) discount not avail-

able to low income groups unable to purchase case lots. In effect, the system requires the poor to purchase alcoholic beverages of inferior quality and denies them the discount available.

Finally, the statute, if the purpose is to promote temperance by fixing high prices, in effect, fosters prohibition only for the economically disadvantaged and not for the poor in violation of the Equal Protection Clause of the Fourteenth Amendment.

Section 24755 of the California Business and Professions Code which sets up the price fixing statute, is a statute which is clearly written by and for the liquor distillers and on its face presently violates Federal anti-trust laws. Prior to 1961, the statute provided that branded alcoholic beverages in fair and open competition could be fair traded in California upon a price established by a contract or agreement. This was in line with the express provisions of the exemptions provided by the Miller-Tydings (15 U. S. C. A. §1) and McGuire (15 U. S. C. A. §45) acts.

The amendment in 1961 of Section 24755 (in response to a finding by a Superior Court that a revocation was improper because there had been no finding that the items were in fair and open competition as required by the statute and the exemption amendments to the Sherman Act §1) eliminated the necessity of a contract or agreement and eliminated the requirement that the commodity be in fair and open competition.

The elimination of these requirements is clearly not in accord with the anti-trust immunity provided for by the Miller-Tydings and the McGuire Acts and minimum price fixing by agreement or compulsion is illegal per se under the Federal anti-trust laws unless the Federal exemption statutes apply. (See: United States v. McKesson & Robbins, 351 U.S. 305, 309-311 [1953] and Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386-388 [1950]. It can be noted that the latter case concerned contracts for price fixing of liquor and it was still struck down by the United States Supreme Court.)

Since the California statute does not provide for either "fair and open competition" or for contracts, it is not immunized from Federal anti-trust laws. Eastman Kodak v. Federal Trade Commission (2nd Cir.), 330 U.S. 828, clearly hold that the Miller-Tydings amendment only validates retail price agreements with respect to pricing of commodities which are in effective competition with similar commodities produced by others.

Evidence of "lack of fair and open competition" has not been permitted before California administrative agencies or courts. See: DeMartini v. Department of Alcoholic Beverage Control, 215 Cal. App. 2d 787 and Dave's Market v. Department of Alcoholic Beverage Control, 222 Cal. App. 2d 671.

The California Attorney General, representing the Department of Alcoholic Beverage Control, has argued in the Wilke and Holzheiser and

Allied Properties cases, supra, that the Twenty-first Amendment to the United States Constitution prevents any challenge of the California statute. It has since been established by the United States Supreme Court, however, that no such rule exists, e. g., in Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U. S. 324, 12 L. Ed. 2d 350, 84 S. Ct. 1293, where the court states at 12 L. Ed. 2d, at page 356, that:

> "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to repeal the commerce clause wherever regulation of intoxicating liquors are concerned, would be an absurd over simplification."

The Supreme Court in 1966 held, in Joseph E. Seagram, Inc. v. Hostetter, 86 S. Ct. 1254, that the Twenty-first Amendment must be read in light of the other amendments of the Constitution, and although the court upheld the New York law being questioned there, it clearly established the principle that the State law had to be a reasonable law and not deny the requirements of Equal Protection of the laws as provided by the Fourteenth Amendment.

The facts found by the "Moreland Commission on the Alcoholic Beverage Control law" appointed by Governor Rockefeller regarding the background and ineffectiveness of mandatory price fixing laws also demonstrate the evils of such laws. It was The Moreland report which caused New York to change its mandatory price

fixing statute (which previously was like California's statute) and to pass the present New York statute held constitutional in Seagram & Sons v. Hostetter, 384 U.S. 35, 16 L. Ed. 2d 336, 86 S. Ct. 1254. The Moreland Commission found, at page 1 of the report, that,

> "The mandatory price control should be eliminated because (1) New York consumers are compelled to pay unnecessarily high prices for packaged liquor, (2) competition is stifled and economical waste encouraged."

The statute further constitutes special legislation by the State of California for the benefit of manufacturers and wholesalers of alcoholic beverages.

The statute bears no reasonable relationship to the exercise of the police power of the State or the alleged object sought to be obtained, i. e., the promotion of temperance, indeed, the statute is designed to achieve the opposite effect.

The statute by granting state enforced price fixing powers to private persons also "is an unlawful delegation of legislative authority and is so arbitrary as to amount to a denial of due process" (dissenting opinion, Wilke and Holzheiser, supra, 55 Cal. Rptr. at p. 49).

The Supreme Court is the only court available now to rule on the constitutionality of the California statute. In Dave's Market v. Department of Alcoholic Beverage Control,

(U.S. Dist. Ct. for No. Dist. of California, So. Div., No. 41103), a three judge District Court was convened but sent the matter back for determination on State issues. When the case was returned to the Federal Court, the determination was made that Federal issues must necessarily have been determined along with the State issues and therefore appeal to the Supreme Court was the only remedy. This was also essentially the decision in the District Court case of Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 266 F. Supp. 168.

CONCLUSION

Legalized price fixing and monopoly should be subject to careful scrutiny by the courts to insure strict compliance with the federal exceptions. When a statute allows a manufacturer to set an arbitrary price at which his commodity must be sold throughout the state and then when the state enforces this price at no expense to the manufacturer the consumer is harmed. Not only is the consumer forced to pay the higher price he is also required, by way of taxes for the state enforcement, to pay the cost of enforcing the higher prices.

Such a state sanctioned monopoly and gratuity to liquor manufacturers should not be tolerated. A full briefing of the matter should be allowed by this Court for the protection of the consumers of the State of California and other consumers in states having similar laws.

Respectfully submitted,

JACQUES LESLIE

LAWRENCE TEPLIN

Attorneys for Appellant

APPENDIX "A"

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JAMES O. REIMEL, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. LEVERETTE D. HOUSE, LEON M. COOPER, ROGER P. GARETY, as Chairman and Members of the Alcoholic Beverage Control Appeals Board, Defendants and Respondents.	2nd CIVIL NO. 31240 Court of Appeal Second Dist. FILED May 10 1968 Clay Robbins, Jr. Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Ralph H. Nutter, Judge. Reversed, with directions.

Thomas C. Lynch, Attorney General, and Lynn Henry Johnson, Deputy Attorney General, for Appellant.

Leslie & Rubin and Lawrence Teplin for Real Party in Interest, Pennwick Corporation.

Leo K. Gallant, Senior Counsel, Alcoholic Beverage Control Appeals Board, for Respondent Alcoholic Beverage Control Appeals Board.

The instant appeal arises in the same manner and involves the identical issues recently decided in Reimel v. Alcoholic Bev. etc. Appeals Bd., 256 A. C. A. 188 (hearing denied January 17, 1968).

Here, as in the case above cited, the trial court denied the petition for writ of mandate sought by the appellant, Department of Alcoholic Beverage Control, and thereby upheld the action of the respondent, Alcoholic Beverage Control Appeals Board, in reversing the decision of the Department wherein a penalty had been imposed upon respondent and real party in interest, Pennwick Corporation, for selling certain alcoholic beverages at prices less than the established fair trade price in violation of Business and Professions Code, section 24755, and Title 4, California Administrative Code, section 99(a). The trial court spelled out the basis for its decision in the following conclusion of law:

"The decision of respondent [Alcoholic Beverage Control Appeals Board] that the record must contain substantial evidence of publication of the price schedules in compliance with the provisions of section 24755 of the Business and

Professions Code constitutes a correct interpretation of that code section. Publication of the price schedules in a trade journal circulated among some but not all licensees in the trading area is not such compliance, and the department's rule 99(k) (title 4, California Administrative Code, section 99, subparagraph (k) is invalid and in conflict with the publication provisions of Business and Professions Code section 24755, subparagraph (b)." Subparagraph (b) of section 24755, insofar as here pertinent, reads as follows:

"Any person filing such [minimum retail price] schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof." The Department's rule 99(k) interpreting the above quoted language provides:

"(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof."

The minimum prices for the alcoholic beverages in issue in the instant proceeding had been published in the August 1964 edition of Patterson's Gazetteer. Patterson's Gazetteer is a trade publication directed to the alcoholic

beverage industry. It is published monthly and includes the prices of alcoholic beverages at wholesale and retail. It is published in the eight counties that compose the "trading area of Southern California" (Bus. & Prof. Code, § 24755(b)), and there are no similar publications published in these counties. Its subscribers are liquor licensees, wholesalers and brand owners and it has a circulation of approximately 10, 500 subscribers. Although not necessary to the narrow question here presented, appellant introduced evidence that Pennwick was mailed the issues of Patterson's Gazetteer for June, July, August and September, 1964.

As previously indicated, the court in Reimel v. Alcoholic Bev. etc. Appeals Bd., supra, 256 A.C.A. 188, 195-201, rejected the contention of the respondent Appeals Board that section 24755(b) required that publication occur in such a manner that each retailer will necessarily be advised of the contents of the applicable minimum price schedule. It held that the Department had correctly interpreted section 24755(b) in its rule 99(k) and that the publication required need only be in a manner most likely to give notice to the affected licensees. A trade journal in general circulation in the trading area was held to be a proper vehicle for such publication. We concur in this determination. The more recent decision in Reimel v. House, 259 A.C.A. 532, is in accord.

Although not the basis of the decision here under review, respondent Pennwick urges that section 24755 is unconstitutional and that section

24755.1 relating to penalties and added by the Legislature in 1965 is retroactive in application. Each of these contentions was expressly rejected in Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control, 65 Cal.2d 349, 355 et seq. and 369 et seq., and in Reimel v. Alcoholic Bev. etc. Appeals Bd., supra, 256 A.C.A. 188, 201-204 and 205-206.

Respondent Pennwick in its brief has urged several additional points which were not raised before the Department, the Appeals Board or the superior court. "[T]hese points relate to questions of fact or mixed questions of fact and law which could have been presented to and considered by the Department. Under well-established rules such matters may not be urged for the first time on appeal. [Citations.]" (Reimel, supra, p. 205.)

The judgment is reversed. The superior court is directed to grant a writ of mandate commanding the respondent Appeals Board to set aside its decision reversing the decision of the Department and to affirm such decision of the Department.

HERNDON, J.

We concur:

ROTH, P.J.

FLEMING, J.

THE COURT: This opinion is not for publication pursuant to the provisions of Rule 976, California Rules of Court.

APPENDIX "B"

SERVED
on all parties by
certified mail
Date Nov 2 1965

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation against THE PENNWICK CORPORATION 8347 Beverly Boulevard Los Angeles Respondent and Licensee under the Alcoholic Beverage Control Act.	AB-2441 File No. 17710; Reg. No. 4672 Time & Place of Hearing: August 26, 1965, @10 a.m. 1525 South Broadway, Los Angeles, California For Department: Honorable Thomas Lynch Attorney General John M. Huntington, Deputy Attorney General

For Appellant:
Daniel Schiffer, Esq.
(No appearance at oral argument.)

Submitted on the record.

In a decision adopted by the department on May 20, 1965, it was determined that appellant The Pennwick Corporation had violated section

24755, Business and Professions Code and related department rule 99(a), title IV, California Administrative Code (fair trade provisions). A penalty of suspension of the license for a period of 15 days was imposed.

Appellant's appeal is taken upon the grounds:

"1. The Department has proceeded without jurisdiction;

"2. The Department has proceeded in excess of its jurisdiction;

"3. The Department has not proceeded in the manner required by law;

"4. The Department's Decision is not supported by the Findings;

"5. The Findings are not supported by substantial evidence in the light of the whole record;

"6. The statutes, rules and regulations sought to be enforced by the Department against Respondent are unconstitutional in the respects urged in Respondent's Notice of Defense filed with the Department and incorporated herein by reference, and in the Hearing before the Office of Administrative Procedure."

The department's accusation charging a violation of the minimum retail price provisions

was served on or about October 19, 1964, and alleged that appellant violated or permitted the violation of sections 24752 and 24755 of the Business and Professions Code and rule 99, title IV, California Administrative Code.

Appellant filed a notice of defense under sections 11505 and 11506 of the Government Code and asserted 17 affirmative defenses to the department's accusation. The hearing officer overruled the objections set forth in the notice of defense and held the affirmative defenses to be without merit. In its decision, the department determined that appellant violated section 24755, Business and Professions Code and rule 99(a), title IV, California Administrative Code.

The department's decision contains the following:

"FINDINGS OF FACT:

"COUNT I

"It is true that on August 25, 1965 respondent, then being licensed under the above designated retail off-sale general license at the above designated premises, did at said premises by one of its clerks, sell to Donald Yawman alcoholic beverages at retail in sizes, quantities, and at prices more particularly set forth below, while during the month of August, 1964, the effective minimum retail price for said alcoholic beverages was $19.57 plus sales tax.

"Quantity	Sizes	Brand Names
2	Quarts	Ancient Age Kentucky Straight Bourbon, 6 years old, 86 proof
1	4/5 qt.	Lang's Lightest Scotch 8 years old

Sales Prices	Posted Price per Bottle	Total Minimum Price
	$ 6.29	$12.58
	6.99	6.99
$17.20 including tax		$19.57 .78 tax $20.35

"RULING ON SPECIAL DEFENSES

"The objections set forth in the Notice of Defense filed by respondent

are overruled and the affirmative defenses set forth in said document are found to be without merit.

"FINDINGS AS TO PREVIOUS RECORD: Licenses since April 27, 1962. No prior disciplinary action.

"DETERMINATION OF ISSUES PRESENTED:

"Respondent violated Section 24755 of the Alcoholic Beverage Control Act and Rule 99(a), Title IV, California Administrative Code, as charged. Grounds for the suspension or revocation of its license under Section 24200(b) of said Act were established.

"PENALTY: The license is suspended for 15 days."

The facts relating to the purchase of alcoholic beverages at prices below the minimum prices provided for in the distilled spirits minimum retail price schedules are not in dispute. The testimony of Donald Yawman and Daniel A. LaTendresse, together with exhibits introduced, constitutes substantial evidence as to the fact of sale.

In argument appellant has raised a number of questions pertaining to the minimum price provisions of the Alcoholic Beverage Control Act. These questions pertain mainly to the constitutionality of this legislation. Some

argument has also been directed to claimed error inasmuch as the hearing officer did not afford appellants an opportunity to refute any officially noticed matters as provided for by section 11515 of the Government Code. Appellant also contends that the department did not prove compliance with the statutory requirement concerning publication, citing appeals board decisions AB-2089, Cohon and Sirbu; AB-2185, Carella and Maniscalco; and AB-2258, Dorian and Matoff.

We do not here reach the constitutional question because of the failure of the record to contain substantial evidence to support the department's findings. We find no error with respect to the hearing officer taking official notice of appellant's prior record. Argument on this point becomes somewhat academic inasmuch as the department found that appellant's licensed premises had been "Licensed since April 27, 1962. No prior disciplinary action." Appellant's objection, which may be classified as technical, was properly overruled. Appellant does not contend that the department's finding as to the previous record is incorrect.

In our opinion, the department's decision must be reversed because the record does not contain substantial evidence of publication of the price schedules as required by section 24755 of the Business and Professions Code. (See Appeal of Cohon and Sirbu, AB-2089; Appeal of Carella and Maniscalco, AB-2185; and Appeal of Dorian and Matoff, AB-2258.) The record in the instant matter, based upon the testimony of Owen A.

Sloan, managing editor of "Patterson's California Beverage Gazetteer," establishes that a copy of the trade publication for the period involved in the department's accusation was mailed to appellant. A copy of the August 1964 publication was introduced into evidence (department's exhibit 3, R. T. 14). In our opinion, appellant had notice of the price schedules involved. Although the record was not developed as to the question of circulation of the publication, it is apparent that any licensee who did not pay for a subscription to the publication did not receive the publication. (R. T. 24.) In AB-2185, Carella and Maniscalco, the same question was presented, and we there said:

> " . . . Section 24755(b) requires the filing of a minimum retail price schedule with the department and publication of said price schedule 'in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule.' (Emphasis added.) Subsection (e) of section 24755 provides:
>
> > " 'No offsale licensee shall shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.'

"It is our interpretation of these sections that in order for there to be an 'effective filed price' for the beverage involved, the record must show compliance with the mandatory provisions of section 24755(b) as to filing with the department and publication in the manner prescribed. The offense is not that of selling below the minimum filed price, but rather, of selling, in the language of the statute itself, below the 'effective filed price.' (Emphasis added.) And to be 'effective', the price must be not only filed but also published as required by law. If all that was required was the simple filing of the price schedule with the department, there would have been no need for the Legislature to require publication in the manner indicated and to also insert the adjective 'effective' in subsection (e). Obviously the two provisions are related and must be read together. Such interpretation gives meaning to the express language employed by the Legislature.

"Section 24755 is clear in its requirement that publication '. . . shall . . . be . . . in a manner which will result in each retailer affected . . . being advised . . .' Since to be 'effective' the schedule must be published in accordance with the provisions of this section,

the record must contain substantial evidence of compliance therewith. In our opinion, the record in this case does not establish publication as required by the statute, and so the evidence does not support the department's finding that appellants sold at a price below the minimum retail price schedule duly filed."

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

LEVERETTE D. HOUSE,
CHAIRMAN
ALCOHOLIC BEVERAGE
CONTROL APPEALS
BOARD

We Concur:
Leon M. Cooper
Roger P. Garety

Sacramento, California
October 28, 1965

APPENDIX "C"

CALIFORNIA BUSINESS AND PROFESSIONS CODE

§24755. Minimum retail price schedule; filing; amendments; loss leader sales; rejection of noncomplying schedules; exempt sales. (a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of Southern California and the trading area of Northern California. The trading area of Southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The Northern California trading area shall consist of the other counties of the State. No more than one person shall file a schedule for the same package for the same trading area. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer

affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

No retailer shall sell any package of distilled spirits as a loss leader. "Loss leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

The department shall reject any price schedule which does not comply with this subdivision.

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(f) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has been in this State, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the

stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(g) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the

provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stats. 1961, c. 635, p. 1835, § 4.)

APPENDIX "D"

99. Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required. No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) Brand Defined: The word "brand" as used herein means "brand, trade mark, label or name", and if an additional secondary name or a different form of label is used, each will be considered to be a separate brand.

(c) Distilled Spirits Item Defined. "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of distilled spirits including type of bottling (in bond or not in bond),

and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved.

(d) Distilled Spirits Sold "On-Sale" Only. If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) Who Files Minimum Retail Price Schedules. Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the

owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesaler or importer authorized by an out-of-State or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) Price Schedule Sheets to be Filed. Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department, 1215 O Street, P. O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office for inspection. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC 705" in the lower left-hand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4)

and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minimum retail case prices covering all case sizes must be shown on the price schedules for each size and type.

(g) Filing Dates; New Item. A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month, provided, however, the price of such new item is published on or before the aforesaid effective date.

(h) Change of Minimum Retail Price on File. A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

(i) Change in Price of an Item to Meet

Price of Competitive Brand. A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month, provided, however, such price change is published on or before the aforesaid effective date.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits means one identical as to categories (1) and (5) in the definition of "Distilled Spirits Item" in (c) above; the price change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) Filing Date Exception. Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business the next business day.

(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule

and of every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amendments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

(l) Deliveries. No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been filed with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

(m) Withdrawal of Item from Price Schedule. No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a

finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(n) Transfer of Price Filing Obligation. When, for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

(o) Tax Increase or Government Order. Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(p) Sales as Loss Leaders Prohibited. All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

NOTE: Authority cited for amendment filed 10-2-56: Sections 24757 and 25750, Business and Professions Code; Section 22, Article XX, California Constitution. Issuing agency: Department of Alcoholic Beverage Control. Additional authority cited: Sections 24749, 24750, 24751, 24752 and 25752, Business and Professions Code.

History: 1. Repealer and new section filed 9-12-61; designated effective 10-15-61 (Register 61, No. 18). For prior history, see Register 60, No. 16.

APPENDIX "E"

LAW OFFICES OF JACQUES LESLIE
By DANIEL A. SCHIFFER
9255 Sunset Boulevard, Suite 920
Los Angeles, California 90069
Telephone: CR 5-4424 BR 2-3212

Attorneys for Respondent

BEFORE THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA
P. O. BOX 1139
SACRAMENTO 95805

In the Matter of the Accusation Against	) FILE 17710) REG. 4672
THE PENNWICK CORPORATION - 8347 Beverly Boulevard Los Angeles, California 90048.	) NOTICE OF DEFENSE UNDER SECTION 11505 OF THE GOVERNMENT CODE.
OFF-SALE GENERAL LICENSE Respondent.	)
License under the Alcoholic Beverage Control Act.	) REQUEST FOR HEARING

TO: THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL:

The undersigned Respondent, named in the above entitled proceeding, hereby acknowledges receipt of a copy of the Accusation and the statement that a hearing may be requested in said

proceeding by filing a Notice of Defense as provided in Section 11506 of the Government Code within fifteen (15) days after the service upon the undersigned of said Accusation. A hearing is hereby requested in said proceeding to offer defense to the charges contained in said Accusation.

Attached hereto is Respondent's NOTICE OF DEFENSE as provided in Section 11506, Government Code.

DATED:
October 31, 1964.

RESPONDENT:
THE PENNWICK CORPORATION
LAW OFFICES OF JACQUES LESLIE

By: Daniel A. Schiffer
Daniel A. Schiffer
Attorneys for Respondent
9255 Sunset Boulevard
Los Angeles, California
90069

APPENDIX "E"

LAW OFFICES OF JACQUES LESLIE
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TELEPHONE: CR 5-4424 BR 2-3212

Attorneys for Respondent

BEFORE THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

P. O. BOX 1139

SACRAMENTO 95805

In the Matter of the Accusation Against	) FILE 17710) REG. 4672
THE PENNWICK CORPORATION - 8347 Beverly Boulevard Los Angeles, California 90048	) NOTICE OF DEFENSE UNDER SECTION 11506 OF THE GOVERNMENT CODE.
OFF-SALE GENERAL LICENSE Respondent.	
License under the Alcoholic Beverage Control Act.	

I. OBJECTIONS

Respondent objects to the above entitled and numbered Accusation and to each and every allegation in the single count thereof, upon the following grounds:

1. Respondent objects thereto upon the ground that the same does not state acts or omissions upon which the agency may proceed.

2. Respondent objects to the form of the Accusation on the ground that it is so indefinite that Respondent cannot identify each transaction or prepare its defenses thereto.

3. Respondent objects to the form of the Accusation on the ground that it is so uncertain that Respondent cannot identify each transaction or prepare its defenses thereto.

II. AFFIRMATIVE DEFENSES

Respondent, by way of Affirmative Defenses, alleges:

1. that the said proceeding herein violates its rights under the California Constitution and the Constitution of the United States, and, more particularly, with respect to its right to equal protection under the laws of said jurisdictions and its right to due process as guaranteed by each of said Constitutions in that the hearing provided for herein is sham and affords no substance of lawful protection to Respondent.

2. that the Alcoholic Beverage Control Act and the rules and regulations adopted pursuant thereto governing Fair Trade, as they are sought to be applied against Respondent, are violative of Respondent's rights under the Constitutions of the United States and of California in that they create arbitrary, unreasonable and preferential legislative and administrative provisions which constitute special legislation for the use and benefit of the alcoholic beverage vendors to the retailers thereof.

3. that the Alcoholic Beverage Control Act and the rules and regulations adopted pursuant thereto, as they are sought to be applied against Respondent, unlawfully delegate legislative power and thereby are null and void.

4. that the Alcoholic Beverage Control Act and the rules and regulations adopted pursuant thereto, as they are sought to be applied

against Respondent, are violative of Article XX, Sec. 22 of the California Constitution.

5. that the Alcoholic Beverage Control Act and the rule and regulations adopted pursuant thereto, as they are sought to be applied against Respondent, constitute an unlawful, improper and excessive exercise of the police powers of this State, in the following respects:

(a) Neither said Act nor the rules and regulations adopted pursuant thereto, as they are sought to be applied against Respondent, (1) is protective of the safety, welfare, health, peace and morals of the people of this State; (2) eliminates the evils of unlicensed and unlawful sale and disposition of alcoholic beverages; (3) promotes temperance in the use and consumption of alcoholic beverages.

(b) Said rules and regulations violate the Legislative intent as expressed in Sec. 23049 of said Act.

(c) The grounds for disciplinary action asserted by the Department exceed the authority conferred by Article XX, Sec. 22, California Constitution, and Sec. 24200 (a) and (b), Alcoholic Beverage Control Act.

(d) Each of the sections of said Act governing fair trade contracts and price posting, in all respects in which the same are sought to be applied against Respondent, are invalid, unlawful and void in that they constitute:

(1) An unlawful exercise of police powers.

(2) The denial to Respondent of fundamental due process as required by the Constitutions of the United States and of California.

(3) Such arbitrary, capricious, unreasonable and discriminatory classification and regulation of Respondent as a retailer as to prevent the public from deriving the benefits of price and services competition among retailers while at the same time arbitrarily, capriciously, unreasonably and discriminatorily omitting comparable classification and regulation of suppliers to retailers of alcoholic beverage products as contemplated by Article XX, Sec. 22, California Constitution and legislation enacted in implementation thereof.

(4) An unlawful delegation to private, non-governmental persons and entities of the power to perform governmental duties enjoined upon the state by Article XX, Sec. 22, of the California Constitution.

(5) An unlawful appropriation and expenditure of public funds principally for the use and benefit of private, non-governmental persons and entities for non-public purposes, in violation of the Constitution of this state.

(6) An arbitrary, capricious, unreasonable and discriminatory division of the state into trading areas in violation of Sec. 23049 of the said Act.

6. the Accusation and the single count therein, and each and every allegation in said count thereof;

(a) fails to allege facts sufficient to constitute a violation by Respondent of any public law.

(b) fails to allege reasonable or probable cause for the filing of the Accusation against Respondent.

DATED: October 31, 1964.

Respondent: THE PENNWICK CORPORATION

LAW OFFICES OF JACQUES LESLIE

By Daniel A. Schiffer
Daniel A. Schiffer
Attorneys for Respondent
9255 Sunset Boulevard
Los Angeles, California 90069

APPENDIX "F"

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Telephone: CR 5 4424
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Original Filed
Dec 21 1965

Attorneys for Real Party In Interest

SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY
OF LOS ANGELES

JAMES O. REIMEL, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, Petitioner, vs. ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA, Respondent.	NO. 873 353 REG. NO. 4672 ANSWER TO PETITION FOR WRIT OF MANDATE

Real Party In Interest, PENNWICK CORPORATION (herein referred to as "Pennwick"), in answer to the Petition, admits, denies and alleges:

Answering Paragraph IV, admits the allegations therein except denies that said administrative proceedings were duly held; denies that PENNWICK CORPORATION violated Business and Professions Code Section 24755, and Title 4, California Administrative Code Section 99 (a); and alleges that at all times material neither Business and Professions Code Section 24755 nor Section 99 (a) imposed any duty upon Pennwick; that Section 24752 vested no jurisdiction in Petitioner to impose any discipline upon Pennwick; that Section 24752, Business and Professions Code, reads as follows:

> "24752. Selling below fair trade price. Wilfully and knowingly advertising, offering for sale, or selling any alcoholic beverage at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so sdvertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable at the suit of any person damaged thereby.";

that Section 23008, Business and Professions Code, reads as follows:

> "23008. 'Person.' 'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well

as the singular number.";

that Section 24757, Business and Professions Code reads as follows:

> "24757. Rules. The department may adopt such rules as it determines to be necessary for the administration of Sections 24754 to 24756, inclusive.";

that Sections 24749 through 24757, Business and Professions Code, entitled, "Chapter 10, Alcoholic Beverages Fair Trade Contracts and Price Posting," were enacted or amended by the Legislature at the same session thereof (Stats. 1961. Chapter 635) and must be read and construed together; that none of said sections confers any jurisdiction upon Petitioner to discipline Pennwick; that the reference to Section 24755 in Section 24752, Business and Professions Code, specified the only remedy for an alleged violation of said Section 24752 and Section 24755; that Section 24755 pertains only to sales by vendors (specified in Section 24756) to retailers of alcoholic beverages, and confers upon the Petitioner herein no jurisdiction to impose any discipline upon Pennwick.

That Section 99, Title 4, California Administrative Code, reads as follows:

> "99. Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required. No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum

retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

"The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a 'Distilled Spirits Minimum Retail Price Schedule' containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

"(b) Brand Defined. The word 'brand' as used herein means 'brand, trade mark, label or name,' and if an additional secondary name, or a different form of label is used each will be considered to be a separate brand.

"(c) Distilled Spirits Item Defined. 'Distilled spirits item' as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories:

(1) Type of distilled spirits including type of bottling (in bond or not in bond), any type of blend (blend of straight whiskeys or spirits blend);

(2) Percentage of Straight Whiskey;
(3) Age, if shown on the label;
(4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and
(7) Number of bottles in a case.

"Where a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved if it has utilitarian value other than as a container. Such additional cost must not be less than the actual cost, as defined in Section 17026 of the Unfair Practices Act.

"Where a single container constitutes a case, the minimum retail bottle and case price must be the same.

"(d) Distilled Spirits Sold 'On-Sale' Only. If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as 'bar package,' 'for on-sale only'), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

"(e) Who Files Minimum Retail Price Schedules. Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different

prices may be filed in the Northern and Southern trading areas.

"This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesaler or importer authorized by an out-of-State or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

"(f) Price Schedule Sheets to be Filed. Four copies of a 'Distilled Spirits Minimum Retail Price Schedule' on a form prescribed by the department must be filed with the department, 1215 O Street, P. O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office

for inspection. The 'Minimum Retail Price Schedule' may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number 'ABC 705' in the lower left-hand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of 'Price Schedules' must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4) and (5) in the definition of 'Distilled Spirits Item' in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minimum retail case prices covering all case sizes must be shown on the price schedules for each size and type.

"(g) Filing Dates; New Items. A set of original schedules for new items must be

filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month; provided, however, the price of such new item is published on or before the aforesaid effective date.

"(h) Change of Minimum Retail Price on File. A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

"(i) Change in Price of the Item to Meet Price of Competitive Brand. A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month; provided, however, such price change is published on or before the aforesaid effective date.

"A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a 'Price Schedule' sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits

means one identical as to categories (1) and (5) in the definition of 'Distilled Spirits Item' in (c) above; the price change involved must apply to the identical item indicated in categories (6) and (7).

"If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

"(j) Filing Date Exception. Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business of the next business day.

"(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amendments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required

for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

"(l) Deliveries. No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a 'Price Schedule' with that item thereon has been filed with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

"(m) Withdrawal of Item from Price Schedule. No item may be deleted from a replacement 'Price Schedule' once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

"(n) Transfer of Price Filing Obligation. When, for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue

in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

"(o) Tax Increase or Government Order. Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

"(p) Sales as Loss Leaders Prohibits. All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product."

II

Answering Paragraph V, admits the allegations therein, except alleges that the

Appeals Board reversed the Department's decision on the ground that "the department's decision must be reversed because the record does not contain substantial evidence of publication of the price schedules as required by Section 24755 . . ."; Pennwick further alleges that at no time during the pendency of this proceeding has the Office of Administrative Procedure Hearing Officer, the Department, or the said Appeals Board taken any cognizance of issues of unconstitutionality of the said Fair Trade legislation or of the Department's rules promulgated and enforced pursuant thereto raised and advocated by Pennwick; that such failure to so take cognizance effectively deprived Pennwick of due process of law.

III

Answering Paragraph VI, admits that the allegations setting forth selected subparagraphs of Section 24755, Business and Professions Code, read as set forth therein, and alleges that the omitted subparagraphs set forth in Paragraph I hereinabove are material and indispensable and that said entire Section 24755 must be read in conjunction with Sections 24752, 24756 and 24757, Business and Professions Code, reproduced hereinabove in Paragraph I; that said Appeals Board committed error, as a matter of law, in reposing its reversal solely upon the ground of lack of substantial evidence of publication of prices; that other proper grounds for reversal, in addition to that relied upon by said Appeals Board, were and are the total absence of jurisdiction in the Department to administer,

maintain and enforce an arbitrary price structure for the use and benefit of a private segment of commercial enterprise, and the expenditure of public funds and resources in connection therewith; further, such legislation and the resulting conduct of the Department each constituted an excess of police power and a violation of Article XX, Section 22, California Constitution, proscribing any agency of the State from engaging in the sale of alcoholic beverages. In addition, Pennwick incorporates herein its Objections and Affirmative Defenses set forth in its Notice of Defense to the Department's accusation (Record of Hearing, Office of Administrative Procedure).

IV

Answering Paragraph VII, denies each and every allegation therein, and alleges that said Appeals Board properly exercised its jurisdiction pursuant to Section 23084, subdivision (a), (b), (c) and (d); alleges that the allegations recited by Petitioner are argumentative and speculative, and are conclusions drawn by Petitioner without factual foundation. Further, Pennwick alleges that, for reasons alleged hereinabove in Paragraphs I, II and III of its Answer, Petitioner and his Department: (a) proceeded without and in excess of any jurisdiction over Pennwick in connection with alleged violations of Fair Trade legislation; (b) did not proceed in the manner required by law; (c) further, that his and his Department's decision was not supported by the findings; and (d) the findings were not supported by substantial evidence in the light

of the whole record made before the Office of Administrative Procedure.

V

Answering Paragraph VIII, denies each and every allegation therein and incorporates by reference its answer set forth in Paragraph IV hereinabove, and alleges that there was no evidence that Pennwick had notice of any published prices during the period covered by the accusation.

VI

Answering Paragraph IX, denies each and every allegation therein and alleges that the Department has not suffered, and cannot and will not suffer, any injury for the reasons cited by Petitioner; that his allegations of injury are inadequate as a matter of law; that Petitioner has failed to show how and in what manner his or his Department's administrative discretion has been abridged, and how his and its jurisdiction will be or could be illegally circumscribed when, in fact, no such jurisdiction ever existed; that Petitioner has failed to show how and in what manner he has been aggrieved by the decision of the Appeals Board.

VII

Answering Paragraph X, denies each and every allegation therein and alleges that Petitioner, having acted without jurisdiction, has no right to seek relief from this Court.

WHEREFORE, Pennwick prays that:

(a) Petitioner be denied the Alternative and Peremptory Writs of Mandate sought herein;

(b) the Appeals Board decision reversing Petitioner and the Department of Alcoholic Beverage Control be affirmed;

(c) the Fair Trade Legislation, as set forth in the Alcoholic Beverage Control Act be declared null and void for constitutional infirmities;

(d) for all other proper relief.

DATED at Los Angeles, California, this 13th day of December, 1965.

LAW OFFICES OF
JACQUES LESLIE

By: Daniel A. Schiffer
Daniel A. Schiffer

Attorneys for Real Party in Interest - PENNWICK DORPORATION

9255 Sunset Boulevard -
Suite 920
Los Angeles, California 90069

CERTIFICATION

I, BION R. GREGORY, do hereby certify that I am the duly appointed, qualified and acting Principal Counsel and executive officer of the Department of Alcoholic Beverage Control of the State of California. I do hereby further certify that I have been duly authorized by action of said Department of Alcoholic Beverage Control to accept service of documents pertaining to petitions for writs of mandate and other actions brought against the Department of Alcoholic Beverage Control in any county of this State. Pursuant to this authorization, I have customarily and continuously accepted service on behalf of said Department to the knowledge and with the approval of the Director of said Department of Alcoholic Beverage Control.

I do further certify and acknowledge that I have this day, on behalf of said Department, accepted service of copies of the Answer to Petition for Writ of Mandate and Memorandum of Points and Authorities served on behalf of PENNWICK CORPORATION, a Real Party In Interest herein.

Executed in Sacramento, California, this 17th day of December, 1965.

/s/ Bion R. Gregory
BION R. GREGORY
Principal Counsel and Executive Officer DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATION

I, CHARLES P. JUST, do hereby certify that I am the duly appointed, qualified and acting Chief Counsel and executive officer of the Alcoholic Beverage Control Appeals Board of the State of California. I do hereby further certify that I have been duly authorized by action of said Appeals Board to accept service of documents pertaining to petitions for writs of mandate and other actions brought against the Appeals Board in any county of this State. Pursuant to this authorization, I have customarily and continuously accepted service on behalf of said Appeals Board to the knowledge and with the approval of the members of said Appeals Board.

I do further certify and acknowledge that I have this day, on behalf of said Appeals Board, accepted service of copies of the Answer to Petition for Writ of Mandate and Memorandum of Points and Authorities served on behalf of PENNWICK CORPORATION, a Real Party In Interest herein.

Executed in Sacramento, California, this 17th day of December, 1965.

/s/ Charles P. Just
Charles P. Just

Chief Counsel and Executive Officer
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD